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IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* SUPERFUND SETTLEMENTS PROJECT, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, ENVIRONMENTAL TECHNOLOGY COUNCIL, UTILITY SOLID WASTE ACTIVITIES GROUP, EDISON ELECTRIC INSTITUTE, AND AMERICAN GAS ASSOCIATION IN SUPPORT OF RESPONDENT

MICHAEL W. STEINBERG
Counsel of Record
WADE B. WILSON
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5141

[Additional Counsel Listed on Inside Cover]

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

DELL E. PERELMAN
LESLIE A. HULSE
AMERICAN CHEMISTRY COUNSEL
1300 Wilson Boulevard
Arlington, VA 22209

Attorneys for Amicus Curiae American Chemistry Council

HARRY M. NG
RALPH J. COLLELI, JR.
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005

Attorneys for Amicus Curiae American Petroleum Institute

KENNETH R. MEADE
JAMES G. VOTAW
HALE & DORR
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attorneys for Amicus Curiae Corporate Environmental Enforcement Council

DAVID E. CASE
ENVIRONMENTAL TECHNOLOGY COUNCIL
734 15th Street, N.W.
Washington, D.C. 20005

Attorney for Amicus Curiae Environmental Technology Council

WILLIAM R. WEISSMAN
PAUL D. ACKERMAN
PIPER RUDNICK LLP
~~1300~~ 1200 19th Street, N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae Utility Solid Waste Activities Group, Edison Electric Institute, and American Gas Association

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INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae Superfund Settlements Project, American Chemistry Council, American Petroleum Institute, Corporate Environmental Enforcement Council, Environmental Tech-

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

nology Council, Utility Solid Waste Activities Group, Edison Electric Institute, and American Gas Association represent diverse sectors of American industry. For more than twenty years, their member companies have been actively involved in performing cleanups at hundreds of contaminated sites throughout the United States at a cumulative cost well in excess of $10 billion.

These private sector cleanups are the fruit of EPA's basic policy decision twenty years ago that "[i]t is . . . preferable for private parties to conduct cleanups themselves . . . ."[2] But private-sector cleanups would be discouraged and delayed if the right of contribution under CERCLA[3] were now to be restricted, as urged by Petitioner and the Government as *amicus curiae*.[4]

The right of contribution is the sole mechanism that allows the member companies of *amici curiae* to collect from other liable parties their equitable shares of the cleanup costs.[5]

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[2] U.S. EPA, *Hazardous Waste Enforcement Policy* (Dec. 5, 1984), *published at* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

[3] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), is more commonly known as "Superfund."

[4] Nowhere in its brief does the Government address the inconsistency between its position as *amicus curiae* before this Court and EPA's 20-year old policy decision that it is "preferable for private parties to conduct cleanups themselves." Nor does the Government acknowledge the long history of CERCLA litigation in which the right of contribution has been recognized—expressly or implicitly—even in the absence of a prior civil action under CERCLA. *See, e.g., Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 208 (D. Conn. 2001).

[5] The Superfund Amendments and Reauthorization Act ("SARA") created § 113 of CERCLA, recognizing a right of contribution for potentially responsible parties ("PRPs"). *See* 42 U.S.C. § 9613(f)(1). Section 113(f)(1) "clarifies and confirms" the federal common-law right to seek contribution from other potentially liable parties under CERCLA. S. Rep. No. 99-11, at 43-44 (1985).

These member companies frequently perform cleanups—either voluntarily or at the request of government agencies—at sites where they are responsible for only a small share of the contamination. They agree to perform these cleanups, despite their relatively small shares of liability, in reliance upon the right of contribution, which allows them to compel other liable parties to pay an equitable share of the cleanup costs. If that right is restricted, these member companies will have little reason to step forward and perform cleanups while other companies that contaminated the same sites escape liability.

The Superfund Settlements Project ("SSP") is a non-profit association of major corporations with substantial experience in the Superfund program. The SSP's member companies represent a broad range of American industry. Organized in 1987, the SSP is dedicated to improving Superfund's implementation by reducing barriers to settlement, minimizing transaction costs, and using existing legal authorities to make the program faster, fairer, and more efficient. To date, the SSP's member companies have spent more than $6 billion on site cleanups.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a $462 billion enterprise and a key element of the nation's economy. ACC is committed to improved environmental, health and safety performance through Responsible Care©, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. Since 1980, ACC member companies have spent billions of dollars in Superfund taxes and Superfund cleanups.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 400 member companies engaged in all aspects of the oil and natural gas

industry, including exploration, production, transportation, refining, distribution and marketing. API frequently represents its members on important legal and policy matters before the courts, agencies, and legislative bodies. API's members are or have been directly involved in the remediation—including voluntary remediations—of numerous sites under CERCLA, often at great economic cost, and have a strong interest in the timing and process of contribution actions brought under that statute.

The Corporate Environmental Enforcement Council ("CEEC") is an organization of corporate counsel and environmental management representing 30 major companies from a wide range of industrial sectors, including metals, chemicals, pharmaceuticals, paper, oil refining and natural resource exploration, mining, food and home products. CEEC focuses on civil and criminal environmental enforcement and enforcement policy issues by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policy makers. CEEC member companies are involved in investigation, removal and remediation activities at hundreds of Superfund sites across the United States.

The Environmental Technology Council ("ETC") is the national trade association for the commercial hazardous waste management industry. ETC firms provide technologies and services to customers for the recycling, treatment and secure disposal of industrial and hazardous wastes, including the cleanup of contaminated industrial sites. Many ETC members are also involved in RCRA corrective action cleanups at their own properties.

The Utility Solid Waste Activities Group ("USWAG") was formed in 1978, and is an association primarily dedicated to assisting its members in the management of wastes, the

beneficial use of materials associated with the generation, transmission, or sale of electricity and natural gas, and the remediation of contaminated sites in an environmentally-protective and cost-effective manner. Its membership is comprised of approximately 80 energy industry operating companies as well as several energy industry associations, including the Edison Electric Institute ("EEI") and the American Gas Association ("AGA"). EEI is the national association of investor-owned electric utility companies and acts as spokesman for those firms on subjects of national interest. AGA is the national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S. and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

Disposition of the issue raised in this case will have a direct effect on *amici curiae* and their member companies. If the right of contribution were to be restricted, as urged by Petitioner and the Government, then many member companies would find themselves in an untenable position. They have already agreed to perform many costly cleanups for which they should only be partially responsible, without waiting to be sued under CERCLA. Yet they would now lose their only effective means of obtaining equitable contribution from other parties that are also responsible for the contamination but decline to share in paying the cleanup costs.

Additionally, *amici curiae* and their member companies would be adversely affected at many other sites that have not yet been addressed. If the right of contribution were to be restricted, then the incentive to perform these cleanups voluntarily would immediately be greatly reduced. Member companies would understandably be reluctant to begin cleanups unless they have first been sued under CERCLA and their right of contribution triggered and secured. As a result, some government agencies would effectively be compelled to

file suit against these member companies in order to obtain cleanups. The member companies of *amici curiae* would face increased and unnecessary litigation and other transaction costs.

Amici curiae agree with the Fifth Circuit's *en banc* determination that section 113(f) of CERCLA authorizes an action for equitable contribution whether or not the plaintiff has previously been sued under section 106 or 107 of CERCLA. Rather than presenting additional argument on this legal issue, which is adequately addressed by Respondent (and other *amici curiae* in support of Respondent), *amici curiae* will describe some of the intensely practical considerations that should inform the Court's analysis of this legal issue. In particular, *amici curiae* demonstrate that unless the judgment below is affirmed, the result would be to discourage and delay the cleanup of contaminated sites across the country.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case contained in the brief of Respondent.

SUMMARY OF ARGUMENT

CERCLA was enacted—and amended in 1986—to achieve a single overriding objective: the swift and effective cleanup of contaminated sites. Achieving this goal depends heavily on voluntary and cooperative action by the private sector at many thousands of sites around the country.

To encourage private parties facing potential CERCLA liability to perform cleanups *expeditiously*, Congress provided a right of equitable contribution. Restricting this right of contribution now would be directly contrary to the congressional objective.

Restricting the right of contribution would discourage and delay cleanups at many contaminated sites where both studies

and cleanups often proceed today without the need for any litigation. These include the many thousands of brownfields sites found throughout our inner cities and lower-income communities. They include the thousands of RCRA corrective action sites that are contaminated by decades of industrial activity. They include the thousands of sites contaminated by departments and agencies of the United States government. And they also include the many Superfund sites listed on EPA's National Priorities List.

Without any environmental or other benefit, restricting CERCLA contribution rights as Petitioner seeks would increase the transaction costs to governmental and private parties and divert government enforcement resources from addressing equally important concerns arising under other environmental laws.

ARGUMENT

RESTRICTING THE RIGHT OF CONTRIBUTION WOULD DISCOURAGE AND DELAY THE CLEANUP OF CONTAMINATED SITES, FRUSTRATING THE CENTRAL PURPOSE OF SUPERFUND.

In 1980, in response to the new and frightening problem of abandoned toxic waste sites,[6] Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[7] commonly known as "Superfund." The overriding objective of CERCLA was to achieve the swift and effective cleanup of contaminated sites.[8]

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[6] *See generally* John Quarles & Michael W. Steinberg, *The Superfund Program at Its 20th Anniversary*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10706 (2001).

[7] 42 U.S.C. § 9601 *et seq.*

[8] *See, e.g., Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) ("[I]t is clear that the statute was designed primarily to

To help achieve this ambitious goal, CERCLA combined the individually harsh elements of retroactive liability, strict liability, and joint and several liability into an unprecedented legal framework that is aptly described as Draconian. For example, a company that lawfully sent a small amount of waste to a disposal site many years ago may be singled out by EPA and compelled to spend millions of dollars cleaning up that site, even though many others are equally responsible, or more so, for the contamination.[9]

Within CERCLA's web of often disproportionate and potentially unfair liability, there is but one feature that holds out a promise of fairness and thus provides a very strong incentive for private parties to move forward swiftly to clean up sites. That feature is the right to seek equitable contribution from other liable parties.

From the inception of the Superfund program, EPA has viewed the right of contribution as a key incentive to encourage private parties to perform cleanups despite widespread objections to the new law's unfairness. EPA's thinking was highly pragmatic. Government simply does not have the resources to address all of the contaminated sites, nor is it often able to address those sites quickly or efficiently.

As early as 1984, therefore, EPA decided to implement CERCLA based on a fundamental policy choice: "It is . . . preferable for private parties to conduct cleanups themselves . . . ."[10] Building on that recognition, EPA committed itself to

facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes.").

[9] Although CERCLA does not expressly state the standard of liability, the courts have generally construed CERCLA § 107 liability to be retroactive, strict, and joint and several. *See, e.g., In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993).

[10] U.S. EPA, *Hazardous Waste Enforcement Policy* (Dec. 5, 1984), *published at* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

"minimize impediments to voluntary cleanup."[11] EPA also pledged to support in court the equitable claims of companies that performed cleanups against companies that declined to participate.

In 1986, Congress ratified EPA's approach—and expanded it—in the Superfund Amendment and Reauthorization Act ("SARA"), Pub. L. 99-499 (1986). The right of equitable contribution was specifically confirmed by the addition of new section 113(f) to the statute. The logic behind this key feature of SARA was explained by this Court as follows:

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and *Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.*[12]

Four years later, in 1990, EPA amended the National Contingency Plan ("NCP") that governs Superfund cleanups. At that time, EPA added a new Subpart H for the express purpose of clarifying how private parties should go about

[11] *Id.* at 5042.

[12] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989) (plurality opinion) (emphasis supplied, citations omitted), *overruled on other grounds, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Congress sought "to ensure the prompt and thorough cleanup of contaminated sites *largely through the enactment of Section 113(f).*" *See United States v. Compaction Systems Corp.*, 88 F. Supp.2d 339 (D.N.J. 2000) (emphasis supplied, footnote omitted).

performing cleanups with the goal of recovering their costs from other parties through contribution litigation.[13]

EPA explained its new Subpart H rules with reference to its long-standing policy governing the Superfund program:

> EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.[14]

Similarly, EPA took pains to state that parties performing cleanups may file suit to recover their costs without awaiting the completion of the cleanups. In EPA's words:

> [R]equiring a party to incur *all* costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the intent of Congress that sites be cleaned up *expeditiously*.[15]

EPA's reliance on the right of contribution as a powerful incentive for private-party cleanups has been highly successful, resulting in cleanup settlements with a cumulative value in excess of $20 billion.[16] Today, it is common for companies to agree to perform the entire cleanup at a contaminated site, even though their fair share of the problem may be

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[13] 40 C.F.R. pt. 300, subpt. H (2003).

[14] *National Oil and Hazardous Substances Pollution Contingency Plan* ("NCP"), 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) (codified at 40 C.F.R. pt. 300, subpt. H (2003)).

[15] *Id.* at 8798 (emphasis supplied).

[16] U.S. EPA, *Superfund Accomplishment Figures, Summary Fiscal Year (FY) 2003*, *available at* http://www.epa.gov/superfund/action/process/numbers.htm (Dec. 31, 2002). This figure is for Superfund sites only, and thus does *not* include the value of the many agreements to perform cleanups at brownfields sites, RCRA corrective action sites, federally owned sites, and voluntary cleanup sites, all of which are discussed *infra*.

relatively modest. Over 70% of the new Superfund cleanups each year are launched through agreements such as these.[17]

These agreements are possible precisely because the companies know they can seek equitable contribution from those that do not participate voluntarily.[18] However, if a CERCLA section 106 or 107 action were to become a necessary predicate to asserting such claims, the economically rational response in many instances would be for the companies to resist undertaking any new cleanup obligations until a governmental agency sues them under CERCLA.

Contrary to EPA's 20-year old policy decision that "it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination,"[19] Petitioner and the Government as *amicus curiae* now seek to restrict substantially the right of contribution. Doing so would discourage and delay the very cleanups that Congress sought to encourage and accelerate.[20] It would also obstruct the ability of those performing the cleanups to recover their costs from the other parties that are liable for the contamination.[21]

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[17] *Id.*

[18] *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (implicitly allowing contribution action to proceed without state or federal precursor action of any kind); *Westfarm Associates Ltd. P'ship v. Washington Suburban Sanitary Comm'n.*, 66 F.3d 669, 677 (4th Cir. 1995) (same).

[19] *Supra* n. 14.

[20] *See, e.g.*, John M. Hyson, *Contribution Claims Under Section 113(f)(1) of CERCLA*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10151, 10155 (2002).

[21] The Government unrealistically suggests that CERCLA "does not prevent" a company from "first entering into a settlement" with EPA or its state counterpart, and *then* seeking contribution from other parties. Brief for the United States at 27 n.12. Not only is this option contrary to the

Moreover, the pool of government resources dedicated to enforcement of environmental laws is limited. In recognition of this fact, EPA maintains a detailed strategic plan to assure that its enforcement resources are allocated properly by, inter alia, "identify[ing] the most egregious violators and return[ing] them to compliance as quickly as possible."[22] Restricting the right of contribution would require EPA and its state agency counterparts to divert resources away from the pursuit of other important environmental enforcement priorities in favor of commencing otherwise needless CERCLA section 106 and section 107 litigation.[23]

This brief demonstrates the severe negative impacts that restricting CERCLA contribution rights would have in several recurring real-world situations. The right of contribution currently plays an important role in supporting timely and cost-effective cleanup at these sites. It also promotes reuse and redevelopment of thousands of additional contaminated sites that governmental agencies might otherwise never address.

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approach EPA has followed for the last 20 years, it is also unavailable as a practical matter. By "entering into a settlement," the Government means a CERCLA consent decree and a CERCLA complaint under section 107. EPA simply does not have the resources—or the desire—to draft and file such documents for the thousands upon thousands of contaminated sites that are in need of cleanup. Most of these sites are of no interest to EPA, which is fully occupied dealing with the sites on its National Priorities List. Thus, a company that asks EPA to make time to negotiate a set of documents for a site that is of no federal interest almost certainly will be turned down.

[22] U.S. EPA, *2003-2008 EPA Strategic Plan* at 113 (EPA-190-R-03-003), *available at* http://www.epa.gov/ocfo/plan/2003sp.pdf (Sept. 2003).

[23] Indeed, EPA's current Strategic Plan acknowledges that its ability to achieve its objectives for cleanup of contaminated sites could be adversely affected by a change in the current status of EPA's ability to rely upon private-party response. *Id.* at 72.

A. Brownfields Sites.

Most of this country's contaminated sites are very different from the roughly 1,240 Superfund sites on EPA's National Priorities List. America today is blighted by *hundreds of thousands* of sites that are smaller and less contaminated. These "brownfields" sites, heavily concentrated in our cities, take a huge economic and social toll on our nation.

However, most of these sites are not so contaminated as to present major threats to human health or the environment; as a result, federal and state regulators simply will never get around to ordering or performing cleanups. Thus, the only realistic potential for cleaning up these hundreds of thousands of sites is voluntary action by responsible parties.[24] Yet the disincentives to voluntary cleanups remain daunting.

Because these sites are contaminated, and because cleanup standards are uncertain and constantly changing, potential reuse or redevelopment of the land is discouraged. Fear of future CERCLA liability also chills the desire to perform cleanups for reuse or redevelopment. Because the sites cannot be reused or redeveloped until they are cleaned up, the cities in which they are located forfeit the property taxes that going businesses would generate. And because businesses are reluctant to invest in these sites, the communities in which they are located are deprived of the jobs and other economic benefits that would go hand in hand with redevelopment.

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[24] The Government acknowledges that "private parties have played, and will continue to play, a prominent role in cleaning up many of those [brownfield] sites." Brief for the United States at 27 n.13. Ironically, the Government fails to recognize that the private sector plays a far *more* prominent role in cleaning up the other categories of sites addressed *infra*: RCRA corrective action sites, sites polluted by the United States, Superfund sites, and sites being cleaned up under § 106 administrative orders issued by EPA.

In order to reverse these grim conditions and restore the nation's lower-income neighborhoods, the federal and state governments have enacted a host of programs over the past few decades. The most recent of these is the Brownfields Revitalization and Environmental Restoration Act of 2001, which provides many new incentives to help realize the goal stated in the title of the law itself.[25]

The new law's incentives include partial immunity from CERCLA liability for prospective purchasers of contaminated property, for property owners whose land is contaminated by pollutants migrating from contiguous properties, and for landowners who clean up property under a state cleanup program. Other pre-existing programs include enterprise zones and empowerment zones, each featuring tax benefits for companies that locate in these distressed areas.

Thus, the overwhelming governmental response to the challenge of brownfields sites is to *encourage* private industry to undertake cleanups on a voluntary basis and thereby trigger redevelopment. CERCLA's right of contribution plays a significant complementary role with these other incentives. It encourages companies to perform the cleanups first, postponing the inevitable disputes over which company should pay what share of the costs.

Restricting the right of contribution would fly in the face of this larger public policy. It would brand as a legal "volunteer" any company that performs a brownfields cleanup before the United States has filed suit against it under section 106 or 107 of CERCLA. Thus, the company that performed the cleanup would be denied equity on the ground that not enough litigation has been commenced against it! This absurd result can only delay the very cleanups that Congress sought to accelerate.

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[25] *See* Pub. L. No. 107-118, Tit. II, 115 Stat. 2356 (2002) The law also creates a brownfield grant program for local governments and non-profit organizations who redevelop brownfield sites.

B. RCRA Corrective Action Sites.

A second major group of contaminated sites is addressed through the corrective action program under Subtitle C of the Resource Conservation and Recovery Act ("RCRA").[26] This group consists of more than 6,500 active industrial facilities that handle, or formerly handled, hazardous wastes.[27] These sites, in contrast to the typical brownfields sites, are often heavily contaminated after decades of industrial operations. In 1984, Congress mandated that these facilities undergo "corrective action" under section 3004 of RCRA.[28]

"Corrective action"—another term for cleanup of past contamination—is typically implemented either through RCRA permits or through RCRA administrative orders on consent. The permits and orders are generally issued to the current site owners by the state environmental regulatory agencies, subject to overall EPA oversight of their programs.[29]

Site owners performing corrective action often seek equitable contribution from others under CERCLA,[30] and they have good reason to do so. One common fact pattern is that an

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[26] 42 U.S.C. §§ 6921-6939e.

[27] *See* http://www.epa.gov/epaoswer/hazwaste/ca/backgnd.htm#4 (last modified March 25, 2004).

[28] Section 3004(u) of RCRA provides that permits issued after enactment of the 1984 Amendments "shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u).

[29] For example, such orders may be issued under §§ 3008(h) or 3013 of RCRA. 42 U.S.C. §§ 6928(h), 6934.

[30] EPA itself has championed the use of CERCLA to recover costs incurred at RCRA corrective action sites. *See United States v. Rohm and Hass Co.*, 2 F.3d 1265, 1272-75 (3d Cir. 1993).

industrial facility has been operated successively by two or more companies over many decades. RCRA typically looks only to the *current* owner to perform the cleanup,[31] but in fact it may be one or more of the *previous* owners that contributed most of the contamination at the site. Thus, the availability of a contribution remedy is a very important consideration for a company about to embark on a costly RCRA corrective action project.

On the other hand, restricting the right of contribution as urged by Petitioner and by the Government as *amicus curiae* would mean that a site owner performing corrective action has *no* ability to seek equitable contribution from others toward the costs of cleanup. This is because neither a RCRA permit nor a RCRA administrative order on consent qualifies as a "civil action" brought under sections 106 or 107 of CERCLA.

Moreover, restricting the right of contribution would encourage many site owners to resist, delay, and foot-drag in the implementation of RCRA corrective action. This unfair and illogical result benefits no one—not the community in which the facility is located, not the state agency overseeing the cleanup, and not the site owner.

C. Sites Polluted by the Federal Government.

Restricting the right of contribution would also produce uniquely unjust results at the many thousands of sites contaminated by the departments and agencies of the United States itself. These include not just the sites actually owned and operated by the United States, but also the many private sites to which the United States contributed waste.

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[31] *See, e.g.*, RCRA § 3013, 42 U.S.C. § 6934.

The docket of contaminated sites owned and operated by the federal government is staggering.[32] The United States owns and manages half a billion acres of land[33] containing more than 60,000 potentially contaminated sites.[34] Among these sites are former nuclear weapons production facilities, military bases, abandoned mines, landfills, and underground storage tanks.[35] According to the Government, the total cleanup cost for these sites is estimated to be at least $230 billion, and may be nearly twice that amount.[36]

Somewhat smaller, and somewhat harder to quantify, is the docket of privately-owned sites with contamination resulting in whole or in part from the activities of the federal government. These sites include waste oil recycling facilities that primarily served military bases,[37] nuclear fuel processing plants that helped support the Cold War weapons production

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[32] *See* House Comm. on Natural Resources, Subcomm. on Oversight and Investigation, 103D Cong., *Deep Pockets: Taxpayer Liability for Environmental Contamination* (Comm. Print No. 2 1993).

[33] The Department of the Interior alone manages over 440 million acres of federally owned land, and the Department of Defense manages another 25 million acres. *Superfund Reauthorization,* Hearings Before the Subcommittee on Water Resources and the Environment, 104th Cong., 1st Sess. 829, 834 (1995).

[34] According to the most recent government estimate, a total of 60,425 potentially contaminated sites are present on land owned by the Departments of Agriculture, Defense, Energy, and Interior. Federal Facilities Policy Group, *Improving Federal Facilities Cleanup* 17 (October 1995).

[35] *Id.*

[36] The most recent government estimates range from $234 billion to $388 billion in cleanup costs. *Id.*

[37] The Bridgeport Rental and Oil Services Superfund site in Logan Township, New Jersey is a good example. Its most prominent feature was a 13-acre oil lagoon that contained PCBs. Most of the oil originated at the nearby Philadelphia Naval Shipyard.

programs,[38] and disposal sites that accepted large volumes of waste from the government.[39]

EPA and state regulatory agencies seek to expedite the cleanups at these sites, but they are often unable to sue the federal department or agency that helped to create the problem.[40] Instead, they frequently approach private companies that also share the liability at these sites,[41] hoping the companies will agree to undertake the cleanups themselves.

In some cases, this can be a "win-win" approach. Some companies sign on to perform these massive cleanups, with the expectation that they can swiftly obtain equitable contribution from the United States.

But if the right of contribution were now restricted to parties that have been sued under sections 106 or 107 of CERCLA, then companies voluntarily cleaning up sites polluted by the United States would typically have no right of contribution. As a result, companies would be far less willing in the future to agree to perform such cleanups voluntarily.

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[38] *See, e.g., Westinghouse Electric Co. v. United States,* No. 4:03CV00861 SNL (E.D. Mo., filed June 26, 2003) (CERCLA complaint seeking contribution for cleanup of radioactive and hazardous contamination at former Hematite nuclear fuel processing plant in Festus, Missouri).

[39] For example, the Stringfellow Acid Pits site near Los Angeles, California counted nearby military installations among its major customers.

[40] EPA is typically prevented from suing other federal agencies because the Department of Justice views such cases as conflicts within the Executive Branch that present no justiciable case or controversy under article III of the Constitution. *See generally*, Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 Ecology L.Q. 317, 325-27 (1990). States are often prevented from suing the same federal agencies by the doctrine of sovereign immunity.

[41] These companies may include government contractors that operated the facilities for the United States.

Because EPA and its state agency counterparts cannot sue the federal agencies to compel them to clean up these sites, they will face a Hobson's choice.[42] Either EPA and the states will have to sue private companies at these sites, and those companies will then sue the United States for contribution, thereby burdening the courts with needless claims, or else the cleanups will be delayed indefinitely. Neither result can be squared with the central purpose of CERCLA.

D. Superfund Site Investigations.

Restricting the right of contribution would also discourage and delay cleanup in a fourth situation. It would preclude a responsible company from seeking equitable contribution toward the often considerable costs of investigating a Superfund site to determine the most appropriate method of cleanup. These site studies, collectively referred to as a Remedial Investigation and Feasibility Study ("RI/FS"),[43] are typically performed pursuant to an administrative order on consent issued under section 104 of CERCLA.[44] These studies are essential to the development and selection of an appropriate cleanup plan, regardless of who will actually perform the cleanup.

In many cases, the RI/FS studies take years to perform and cost several million dollars. But the studies are typically performed pursuant to an administrative order, and thus no litigation under sections 106 or 107 is involved. If the right of contribution were now restricted to those parties whom the United States has already sued under these sections, then the companies performing the RI/FS studies at Superfund sites would have no ability to seek equitable contribution. As a result, companies will be much less willing to enter into

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[42] *See* n. 40 *supra*.

[43] *See* 40 C.F.R. § 300.430 (2003).

[44] *See* 42 U.S.C. § 9604.

administrative orders on consent in the future to perform these critical studies. Either EPA will have to resort to litigation in order to coerce the work—and trigger the right of contribution—or else the work will, again, have to wait. Neither result comports with CERCLA's overriding objective.

E. Section 106 Unilateral Administrative Orders.

Restricting the right of contribution would also discourage and delay cleanup in another major category of Superfund sites. These are the sites where EPA issues unilateral administrative orders under section 106 of CERCLA to compel the performance of cleanup work. Denying contribution in these situations would be particularly illogical, unfair, and contrary to the goals of CERCLA.

For more than two decades, EPA has made extensive use of its authority to issue administrative orders under section 106 of CERCLA. More than 1,500 such orders have been issued to date. Because these orders carry extreme enforcement sanctions, including treble damages for noncompliance, they are extremely powerful tools.

In many cases, EPA has issued such orders to companies that bear a relatively small share of responsibility for the contamination found at a site. In the past, companies that performed cleanups under these orders were able to seek equitable contribution from others who were not named by EPA, or who were named but refused to comply.

All of this would change if the right of contribution were now to be restricted. The recipients of past, present, and future section 106 orders would be compelled to perform all of the work themselves, regardless of how small their share of responsibility for the contamination might be. These companies would typically have no effective legal recourse to compel others to contribute their fair shares of the cleanup costs.

Such a harsh and unfair outcome has little to recommend it. Indeed, many companies receiving section 106 orders may decline to comply, preferring to take their chances in court. If EPA sues to enforce the orders, then their right to seek equitable contribution would be triggered under the theory urged by Petitioner and by the Government.

Recognizing the harshness and absurdity of this result, the Fifth Circuit panel majority opinion asserted in *dictum* that section 106 orders somehow fit into the category of "civil actions" described in section 113(f).[45] But a unilateral administrative order generally is *not* considered a "civil action," as the dissenting panel member pointed out,[46] and as the Government argues here.[47]

It also may be suggested that the recipients of section 106 orders could regain their lost rights by requesting that EPA "convert" those orders into consent decrees under section 107. This would entail EPA's first suing the recipients under section 107, thereby triggering contribution rights under the majority panel opinion, and then simultaneously filing with the court a consent decree that resolved the new "litigation." But this convoluted approach has numerous flaws, and it cannot reasonably be what Congress had in mind.

First, the recipient of an order may only request—not compel—EPA to "convert" that section 106 order into a consent decree. EPA may refuse, for any reason at all, and the recipient has no further recourse.

Second, EPA may agree to the "conversion" only in exchange for additional concessions, such as reimbursement of EPA's claimed past costs. Those costs may be substantial, and may be poorly documented and of questionable validity.

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[45] 263 F.3d at 140 n.5.

[46] *Id.* at 147 (Wiener, J., dissenting).

[47] Brief for the United States at 22-23 n.11.

Third, the standard EPA consent decree for Superfund cleanups is such a one-sided document that signing it entails waivers of significant legal rights,[48] which should not be a prerequisite to exercising the right to seek equitable contribution.

Fourth, many Superfund sites consist of two or more operable units ("OUs"). Work on different OUs at a single site may be performed by different parties, some working under section 106 orders and others working under EPA consent decrees. Restricting the right of contribution leads to the inequitable result that some parties would be allowed to seek contribution at a site while others performing work at the same site would not.

Alternatively, a single party could be precluded from seeking contribution for cleaning up one OU pursuant to a section 106 order, but allowed to seek contribution for cleaning up another OU at the same site pursuant to a section 107 consent decree. These arbitrary distinctions do nothing to advance the objectives of CERCLA.

Fifth, even if EPA and the responsible parties were in complete agreement and wished to "convert" a section 106 order into a section 107 consent decree, doing so would burden the district courts with new section 107 complaints filed for the sole purpose of enabling parties that are already performing cleanups to exercise their statutory right to seek equitable contribution from other parties. Such litigation would be highly artificial. It would also represent a waste of scarce judicial, administrative, and private sector resources.

Sixth, restricting the right of contribution would result in a dysfunctional system for recipients of section 106 orders. Consider two hypothetical examples.

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[48] *See* Information Network for Superfund Settlements, *Superfund Cleanup Decision Handbook* (2d ed. 1995).

In the first case, an uncooperative party declines to perform the work until EPA sues it to enforce the section 106 order. At that point, the recipient is entitled to seek equitable contribution because a section 106 civil action is now ongoing.

In the second case, a fully cooperative party receives a section 106 order, performs all of the work, and incurs all of the cleanup costs itself. This party has no recourse to the courts for equitable contribution because it has not been sued under sections 106 or 107.

These results are exactly the opposite of what fairness and logic would dictate. Indeed, restricting the right of contribution in this way would encourage most recipients of section 106 orders to balk at complying, hoping that EPA will sue for enforcement, so they may then use those section 106 civil actions as springboards for their contribution claims. A more powerful deterrent to prompt cleanup is difficult to imagine.

F. Voluntary Cleanups.

Individuals, companies, and communities undertake voluntary remedial actions each year at hundreds of contaminated sites that federal and state environmental agencies simply have not addressed. These voluntary actions are undertaken for a variety of reasons, including the desire to promote redevelopment and reuse of land and the desire to reduce the uncertainty of potential future liability for cleanup costs.

In recognition of the benefits of voluntary actions such as these, numerous states and local governments have enacted voluntary cleanup programs that provide some combination of liability incentives and comprehensive standards. The goal of these programs is to encourage voluntary cleanup actions and to ensure that these private cleanups will be of high quality with minimal direct involvement by environmental agencies. The net result of these programs is that many more sites are cleaned up by voluntary private actions than would

ever be addressed if federal and state governmental agencies were acting alone.

Like the other categories of cleanups described above, voluntary cleanups often proceed more swiftly because the party performing the cleanup expects to obtain equitable contribution from other responsible parties. The risk of potential liability under a CERCLA contribution claim serves as a potent incentive to bring other parties to the negotiating table to address sites without the need for federal litigation under sections 106 or 107 of CERCLA.[49] Conversely, depriving private parties of the ability to equitably shift a portion of the cost of these voluntary efforts through contribution actions would deprive many private parties of the incentive—and perhaps even the means—to perform these beneficial cleanups.

G. State-Law Contribution Claims Do Not Provide the Incentive for Swift and Effective Cleanups.

Petitioner and the Government suggest that restricting the right of contribution might not discourage cleanups, because some companies might still be able to seek contribution under state law.[50] This suggestion is extremely optimistic, as the Fifth Circuit *en banc* majority recognized.[51]

First, CERCLA may preempt state-law contribution claims in many situations where no recovery would be available

[49] The parties performing the cleanup have every incentive to ensure that their actions are cost-effective, for they know that they can only recover from others in a contribution claim those costs that are "necessary," consistent with the National Contingency Plan, and reflective of the equitable shares of liability of those other parties. *See, e.g.*, John M. Hyson, *Private Party Contribution Litigation Under CERCLA*, 207-26, 241-73 (2003).

[50] Brief for Petitioner at 38; Brief for the United States at 27 n.12.

[51] 312 F.3d at 690-91 & nn. 28-30.

under CERCLA itself.[52] The evolving law on preemption may ultimately bar a plaintiff that lacks a CERCLA contribution claim solely because it has not been sued under sections 106 or 107.

Second, many defendants are not amenable to suit in state court because they have not done business in the pertinent state for many years and because the nationwide service of process that CERCLA § 113(e) authorizes in federal court is unavailable to plaintiffs filing in state courts.

Third, suits seeking contribution from the United States would frequently be barred by sovereign immunity, because CERCLA waives that immunity for state-law claims only at sites that are currently "owned or operated by" federal agencies.[53] Many privately-owned disposal sites are heavily contaminated with wastes contributed by the United States,[54] yet the parties cleaning up those sites would have no meaningful recourse under state law.

Fourth, vexing choice-of-law questions would bog down many contribution claims. Consider the relatively common situation where a company organized under the laws of State A, and doing business in State B, ships waste to State C for disposal, and the company is later acquired by a company doing business in State D. When the acquiring company is sued for contribution in State C on a theory of successor liability, which state's law would govern?

Fifth, state law varies widely from one jurisdiction to the next on such key issues as what hazardous substances are

[52] *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998) (state common law restitution and indemnification actions conflict with and are preempted by CERCLA's carefully crafted settlement system).

[53] 42 U.S.C. § 9620(a)(4); *see, e.g., Miami-Dade County v. United States*, No. 01-1930-CIV, 2003 WL 22992271 (S.D. Fla. Dec. 3, 2003).

[54] *See* nn. 32-42 *supra*.

covered, which parties may be held liable, when contribution may be sought, and what costs may be recovered.

Thus, the patchwork of state-law contribution rights, with their attendant lack of predictability on basic issues of scope and coverage, cannot plausibly be viewed as a substitute for the federal right that Congress conferred.[55]

For all of the reasons described above, restricting the right of contribution would have extremely detrimental consequences. It would undermine the incentives for private-sector cooperation that EPA has leveraged so successfully over the past 20 years. Companies often will not voluntarily clean up brownfields sites without first being sued for fear that doing so will foreclose their right to recoup costs from others. Companies with sites in the RCRA corrective action program will be reluctant to perform cleanups under permits or administrative orders for fear of foregoing their right of contribution. At sites polluted by the federal government, the options for EPA and its state counterparts boil down to more litigation or slower cleanups—or both. Finally, companies involved at Superfund sites may be forced to seek out judicial involvement (e.g., by refusing to comply with section 106 orders) to trigger their right of contribution, thus increasing transaction costs and diverting governmental resources from other important environmental enforcement priorities.

All of these results fly in the face of what Congress sought to achieve by enacting—and amending—CERCLA. Accordingly, *amici curiae* urge affirmance of the *en banc* decision of the Fifth Circuit.

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[55] *See, e.g.*, John M. Hyson, *Contribution Claims Under Section 113(f)(1) of CERCLA*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10151, 10155 (2002) (Fifth Circuit panel opinion restricting right of contribution "fails to explain why a Congress, bent on *encouraging* voluntary cleanups, would relegate cost recovery actions by volunteers to state courts") (emphasis in original, footnote omitted).

CONCLUSION

The judgment of the United States Court of Appeals, sitting *en banc*, should be affirmed.

Respectfully submitted,

MICHAEL W. STEINBERG
Counsel of Record
WADE B. WILSON
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5141

DELL E. PERELMAN
LESLIE A. HULSE
AMERICAN CHEMISTRY COUNSEL
1300 Wilson Boulevard
Arlington, VA 22209

Attorneys for Amicus Curiae American Chemistry Council

HARRY M. NG
RALPH J. COLLELI, JR.
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005

Attorneys for Amicus Curiae American Petroleum Institute

KENNETH R. MEADE
JAMES G. VOTAW
HALE & DORR
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attorneys for Amicus Curiae Corporate Environmental Enforcement Council

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DAVID E. CASE
ENVIRONMENTAL TECHNOLOGY
COUNCIL
734 15th Street, N.W.
Washington, D.C. 20005

Attorney for Amicus Curiae
Environmental Technology
Council

WILLIAM R. WEISSMAN
PAUL D. ACKERMAN
PIPER RUDNICK LLP
1200 ~~1300~~ 19th Street, N.W.
Washington, D.C. 20036-2412

Attorneys for Amici Curiae
Utility Solid Waste Activities
Group, Edison Electric
Institute, and American
Gas Association

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